complaining of negligence generally, without averring the defendant was engaged in interstate commerce, the defendant should show by the evidence that the train upon which the plaintiff or his intestate was injured was doing inter-state commerce business, how far would a demurrer to the evidence lie, based solely on the ground that being engaged in inter-state commerce the U. S. Statutes on the subject are exclusively of state authority?

I am, therefore, of the opinion, that the 5th and 6th counts of the declaration charging liability upon the defendant under the U. S. Statutes, standing alone, would allege a liability upon the defendant in favor of the plaintiff and that the demurrer to these two counts, if in a separate action, should be overruled, but that the general demurrer to the declaration should be sustained because of misjoinder and the plaintiff be given leave to amend his declaration by electing under which remedy he will proceed whether under the first four counts based upon the state law or under the last two based upon the U. S. Statutes and striking from the declaration those counts upon which he does not elect to proceed. It is, therefore, ordered that this suit be remanded to rules with leave to the plaintiff to amend his declaration as he may be advised.

*Note. See Editorial, post, p. 314.

SUPREME COURT OF APPEALS OF VIRGINIA.

COLES' HEIRS *et al. v.* JAMERSON.

June 8, 1911.

[71 S. E. 618.]

1. **Taxation (§ 734*)—Tax Titles—Deeds—Statute.**—The owner of land, who lived in another county, died, leaving a will devising it to be sold, and the will was not probated in the county where the land was located, so the records did not furnish the information contemplated by Code 1904, §§ 459, 460, and this information was not furnished by the parties in interest, as provided by section 463. The lands were assessed in the name of the owner, instead of to his estate, as required by section 474. Code 1904, § 473, declares that land correctly charged to one person shall not afterwards be charged to another, without evidence of record that such change is proper; and section 661 provides that the holder of a tax deed has the right or title, which was vested in the party assessed with the taxes, or in one claiming under him. Held, that a sale of these lands for de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

linquent taxes passed title, in spite of the noncompliance with section 474.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. Taxation (§ 412*)—Tax Titles—Tax Deeds—Assessment—Statute.—A noncompliance with Code 1904, § 464, requiring separate lists to be kept for white and colored taxpayers, being a statistical measure only, does not vitiate an assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 682-689; Dec. Dig. § 412.*]

3. Taxation (§ 761*)—Tax Titles—Tax Deeds—Advertisement.—A tax deed, which recited that the land was sold by the county treasurer, a public officer, after due advertisement, as required by law, is valid, though not reciting the fact of the adjournment of the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

4. Taxation (§ 754*)—Tax Titles—Tax Deeds—Sufficiency.—Under Code 1904, §§ 642, 645, 662, respectively requiring that the treasurer report the sales to court, that such reports be confirmed, and that reports be made when real estate is bought in the name of the auditor, and section 655, requiring a tax deed to set out all the circumstances appearing in the clerk's office in relation to the deed, the treasurer's report of sale and the order of court confirming the sale are circumstances appearing in the clerk's office in relation to the sale.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 754.*]

5. Executors and Administrators (§ 129*)—Real Property—Sale—Title to Estate.—Code 1904, § 2663, providing that if land be devised to be sold, and no one be appointed, the executor may sell it, and if he fail to qualify, or having qualified, dies, an administrator with the will annexed may sell, gives the executor or administrator no title independent of the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533-536; Dec. Dig. § 129.*]

6. Executors and Administrators (§ 129*)—Real Property—Sale—Wills—Title.—Where a will merely provided that land should be sold, and did not devise it to the executrix, she had only a power of sale, the heirs having the title; and hence an administrator appointed after her death, without the will annexed, had no title to support ejectment.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 129.*]

7. Abatement and Revival (§ 28*)—Parties Plaintiff—Misjoinder—Statute.—In an action of ejectment, where an administrator who had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

no title to land was erroneously made a party plaintiff, the court should, under the direct provisions of Code 1904, § 3258a, order the action to abate as to the administrator, and proceed in the names of the other plaintiffs.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 163-165; Dec. Dig. § 28.*]

Error to Circuit Court, Buckingham County.

Ejectment by T. H. Dickinson, as administrator, and the heirs of J. M. Coles, deceased, against J. D. Jamerson. From a judgment for defendant, plaintiffs bring error. Reversed and remanded.

John M. Payne and *Harrison & Long,* for plaintiffs in error.
Hubard & Gayle and *A. B. Dickinson,* for defendant in error.

WHITTLE, J. This action of ejectment was brought by the plaintiffs in error against the defendant in error, John D. Jamerson, to recover 342 acres of land in Buckingham county, formerly the property of J. M. Coles, deceased, who was the ancestor of the plaintiffs (except T. H. Dickinson), and was brought by the defendant's assignor at a sale for delinquent taxes, and is held by the assignee under a tax deed from the clerk bearing date February 10, 1896. There was a verdict and judgment for the defendant, to which judgment this writ of error was awarded.

The specific grounds of attack upon the title of the defendant are as follows: (1) Because the land was assessed for taxation in the name of J. M. Coles for several years after his death and when returned delinquent, when it should have been charged to his estate; (2) because the land was registered on the land book in the white list, when it should have been registered in the colored list, Coles being a negro; (3) because the tax deed does not recite the adjournment of the sale; and (4) because the deed also fails to show that there was a report by the county treasurer of the sale and the confirmation of such report and sale by the court. We shall consider these several contentions in the order stated.

[1] 1. It is true section 474 of the Code of 1904 provides that when the owner of land dies, having, as in this instance, devised the same to be sold, "it shall continue charged to the decedent's estate until a transfer thereof." Coles was not a resident of Buckingham county, and his will was probated in Prince Edward county, so that the records of the former county did not supply the information contemplated by sections 459 and 460; nor was such information furnished by the parties in interest, as provided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

by section 463. It would be an unreasonable construction of section 474 to hold that a failure after Coles' death to charge the land to his estate would invalidate the assessment.

Section 473 declares that land correctly charged to one person shall not be afterwards charged to another person without evidence or record that such charge is proper.

In construing section 13, c. 183, 2 Rev. Code 1819, which is similar to section 474, supra, in Usher's Heirs *v.* Pride, 15 Grat. 190, Allen, P., at page 200, observes: "I think, however, the entry in the name of the patentees (who had died) concludes the heirs and purchasers claiming under them, and they were forfeited for the delinquency in failing to pay the taxes charged thereon."

So, in Stevenson *v.* Henkel, 100 Va. 591, 42 S. E. 672, a mistake in the name of the owner, if not calculated to mislead, is immaterial.

Again, section 661 provides that "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made at the commencement of the year for which said taxes or levies were assessed, or in any person claiming under such party. * * *"

[2] 2. The requirement of section 464, with respect to separate lists for white and colored taxpayers, was intended as a basis for the apportionment of the school tax found between the white and colored races in proportion to the amount of taxes contributed by them respectively. It was purely a statistical measure (which was never carried into effect), and its nonobservance could not affect the validity of the assessment.

[3] 3. The third assignment calls in question the validity of the tax deed because it does not recite the fact of the adjournment of the sale. The deed does not state that the sale was made by the county treasurer at public auction at the front of the courthouse on February 10, 1896, "after due advertisement as required by law," and that, we think, was a sufficient recital with respect to the fact of the sale. Flanagan *v.* Grimmet, 10 Grat. 421.

[4] 4. The last assignment involves the failure of the deed to recite that the county treasurer made a report of the sale, or that the sale was confirmed by the court, or that it was recorded as required by sections 642, 645, 662.

It is provided by section 655 that the tax deed "shall set forth all the circumstances appearing in the clerk's office in relation to the sale.

In 2 Minor on Real Property, § 1383, the "circumstances" required to be recorded in the clerk's office are summarized as follows:

"(1) The listing and valuation of the land by the assessors and commissioners of the revenue, as contained in their returns to the court or the clerk.

"(2) The levy of the tax commissioner of the revenue.

"(3) The list of delinquent taxes, returned by the county or city treasurer, recorded in the clerk's office in the 'delinquent tax book.'

"(4) The treasurer's report of sales, recorded in the clerk's office in the 'delinquent land book.'

"(5) The notice or advertisement of the sale, which appears by way of recital in the treasurer's report of sales.

"(6) The order of court confirming the sale.

"(7) The surveyor's report, with plat and certificate showing the metes and bounds of the tract sold, the names of adjoining owners, and giving such further description of the land as will serve to identify it and enable the clerk to describe it properly in the tax deed."

Minor on Tax Titles, 118, 119; Delaney *v.* Goddin, 12 Grat. 266; Boon *v.* Simmons, 88 Va. 259, 13 S. E. 439.

We are of opinion that the treasurer's report of sale and the order of the court confirming the sale constitute "circumstances appearing in the clerk's office in relation to the sale," the recital of which is essential to the validity of the tax deed under section 655.

[5] The only assignment of cross-error on behalf of the defendant in error, which we deem it necessary to notice, involves the ruling of the circuit court in regard to the right of T. H. Dickinson, sheriff of Prince Edward county, and as such administrator of J. M. Coles, deceased, to maintain this action.

The supposed devolution of title to the land in controversy on Dickinson is founded upon the hypothesis that, as administrator with the will annexed of Coles, he succeeded to the title vested in the executrix, Hannah Coles, by the will of her late husband under section 2663 of the Code.

In Elys *v.* Wynne, 22 Grat. 224, 230, it was held that the statute does not operate as a conveyance of the estate, or any interest therein, to the executor, but merely gives him power to make any sale of real estate which the will directs to be sold, without empowering any particular person to make the sale, and that the title vested in the heirs, who were the proper parties to maintain ejectment for the land.

In this case the provision of the will is that, after six months from the death of the testator, the land shall be sold by his executrix. The will does not devise the land to the executrix to be sold, but invests her merely with a qualified power of sale.

[6] In Croswell on Executors and Administrators, § 330, the author says: "The question often arises whether, under the

words of the will, the executor holds the land in trust to sell, or whether he has a mere power to sell the land. The importance of this distinction is obvious, since in the one case the title to the land vests in the executor, while in the other it vests in the heirs, subject to be divested by the execution of the power of the executor. It is said to be now settled that if the land is devised to the executor to sell, or devised subject to the debts of the testator, this passes the interest in the lands to the executor; but a direction that the executers shall sell the land gives them only a power of sale and no interest in the land." See, also, 18 Cyc. 302, 303.

11 Am. & Eng. Enc. of Law (2d Ed.) 1035, lays down the same rule as in accordance with the weight of authority.

In the instant case, however, T. H. Dickinson did not succeed even to the powers of the executrix with respect to the real estate under Coles' will, by virtue of section 2663. It affirmatively appears from the record that he was not appointed administrator with the will annexed, but administrator only. The validity of such appointment for any purpose, where there is a will, may well be questioned. In Ewing *v.* Sneed, 5 J. J. Marsh. (Ky.) 459, it was held to be void.

[7] Upon this branch of the case, we are of opinion that the legal title to the land devolved upon the heirs at law of J. W. Coles, deceased, subject to be divested only by a lawful execution of the power of sale. The circuit court ought, therefore, to have ordered the action to abate as to T. H. Dickinson, and to proceed in the name of the other plaintiffs, heirs at law of J. W. Coles, deceased, as if such misjoinder had not been made, in accordance with section 3258a of the Code.

The judgment of the circuit court, for the reasons stated, must be reversed, and the verdict of the jury set aside, and the case remanded for a new trial, to be had in accordance with this opinion.

Reversed.

*Note. See Editorial, post, p. 314.

GORDON *v.* JOYNER.

June 8, 1911.

[71 S. E. 652.]

1. **Taxation (§ 748*)—Tax Deed—Limitation.**—To entitle a purchaser at a tax sale to the benefit of Code 1904, § 661, providing that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.